

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROTHSCHILD DIGITAL
CONFIRMATION, LLC,

Plaintiff,

v.

COMPANYCAM, INC.,

Defendant.

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C.A. No. 19-1109-MN

**DECLARATION OF ANDREW E. RUSSELL IN SUPPORT OF
COMPANYCAM, INC.'S ACCOUNTING OF ATTORNEYS' FEES**

I, Andrew E. Russell, declare as follows:

1. I am partner at the law firm of Shaw Keller LLP (“Shaw Keller”), counsel for CompanyCam, Inc. (“CompanyCam”) in the above-captioned action. I am a member of the Bar of the State of Delaware (No. 5382). I am over the age of 18, and I have personal knowledge of the facts set forth herein and could competently testify about these matters if called upon to do so.

2. I submit this declaration in response to the Court’s order, (D.I. 41), directing CompanyCam to provide an accounting of the attorneys’ fees that CompanyCam seeks, and to provide a brief explanation as to why those fees are reasonable.

3. Attached as Exhibit 1 are true and correct copies of the relevant monthly invoices from Shaw Keller to CompanyCam.

4. Attached as Exhibit 2 are true and correct copies of excerpts from the American Intellectual Property Law Association’s 2019 Report of the Economic Survey.

5. Attached as Exhibit 3 is a true and correct copy of the biography of Karen E. Keller as set forth on the Shaw Keller web site.
6. Attached as Exhibit 4 is a true and correct copy of the biography of Andrew E. Russell as set forth on the Shaw Keller web site.
7. Attached as Exhibit 5 is a true and correct copy of excerpts from *In re: Imerys Talc America, Inc.*, C.A. No. 19-10289-LSS, D.I. 821, (Bankr. D. Del. Oct. 15, 2019) (including Exhibits B and E).
8. Attached as Exhibit 6 is a true and correct copy of excerpts from *In re: Gulfmark Offshore, Inc.*, C.A. No. 17-11125-KG, D.I. 287, (Bankr. D. Del. Sep. 14, 2017) (including Exhibit D).
9. Attached as Exhibit 7 is a true and correct copy of excerpts from *In re: Mach Gen GP, LLC*, C.A. No. 18-11369-MFW, D.I. 13, (Bankr. D. Del. Oct. 15, 2018) (including Exhibit D).
10. Attached as Exhibit 8 is a true and correct copy of excerpts from *In re: Orexigen Therapeutics, Inc.*, C.A. No. 18-10518-JTD, D.I. 1151, (Bankr. D. Del. Jul. 19, 2019) (including Exhibit C).
11. Attached as Exhibit 9 is a true and correct copy of excerpts from *In re: Veneco, LLC*, C.A. No. 17-10828-JTD, D.I. 1048, (Bankr. D. Del. Oct. 26, 2018) (including Exhibit A).
12. Attached as Exhibit 10 is a list of current or recent patent infringement actions in which Shaw Keller and certain other Delaware firms represented parties.
13. Attached as Exhibit 11 are true and correct printouts from Chambers.com, as retrieved on October 21, 2020.

I. Summary of Fees and Rates

1. The invoices attached as Exhibit 1 reflect the billing rates and amounts billed by Shaw Keller over the course of this action, with the exception of fees for hours spent in October, 2020. *See* Ex. 1.

2. Shaw Keller has represented CompanyCam throughout the pendency of this action.

3. The amounts shown in the attached invoices were paid by CompanyCam, except for the most recent invoice for time incurred in October 2020, which is a draft invoice.

4. The total fee amounts included in the attached invoices are summarized below:

Fees Ending	Statement No.	Fees
July 31, 2019	7242	\$135.00
August 31, 2019	7293	\$1,825.00
September 30, 2019	7350	\$902.50
November 30, 2019	7563	\$67.50
December 31, 2019	7616	\$202.50
January 31, 2020	7741	\$1,990.00
February 29, 2020	7837	\$2,852.50
March 31, 2020	7950	\$10,405.00
April 30, 2020	8030	\$5,742.50
May 31, 2020	8134	\$2,020.00
June 30, 2020	8458	\$325.00
July 31, 2020	8511	\$402.50
October 31, 2020	8740 (draft)	\$11,040.00

5. The total amount of fees incurred by Shaw Keller over the course of this action is \$37,910.00.

6. The hourly rates of the attorneys and paralegals who worked on this action are as follows:

Time Keeper	Role	Rate (year)
Karen E. Keller	Partner	\$750 (2020) \$675 (2019)
Andrew E. Russell	Partner	\$650
Mark Rigney	Senior Litigation Paralegal	\$225 (2020)

		\$175 (2019)
Meghan James	Senior Litigation Paralegal	\$225
Samantha Covey	Paralegal	\$175

7. At the relevant time, there were five Shaw Keller partners and one associate admitted to practice law in Delaware, and that associate was assigned to other matters.

8. Due the size and composition of our firm, there was no such associate available to work on this matter without shifting him from his work for other clients.

9. In some instances, Shaw Keller relied on lower-billing-rate paralegals to assist in performing tasks that could also have been assigned to an associate.

10. The hourly rates charged by Shaw Keller in this litigation are consistent with the rates paid by Shaw Keller clients in lead and Delaware counsel matters, regardless of the forum of the litigation. Shaw Keller charges the same rates regardless of whether it is working on a litigation as primary (or lead) counsel, as Delaware counsel, or as co-counsel (e.g., performing litigation tasks beyond those required by the roles of Delaware counsel as specified by the District of Delaware Local Rules).

II. Shaw Keller's Rates Are Reasonable

11. Karen Keller and I are partners at Shaw Keller. Karen Keller has more than 15 years of experience with patent litigation in the District of Delaware. A copy of her biography is attached as Exhibit 3. I have more than ten years of experience with patent litigation in the District of Delaware, including a year spent clerking for the Honorable Christopher J. Burke. A copy of my biography is attached as Exhibit 4.

A. The American Intellectual Property Law Association's 2019 Economic Survey Shows That Shaw Keller's Rates Are Reasonable

12. In 2019, the American Intellectual Property Law Association published its "2019 Report of the Economic Survey" ("2019 Economic Survey").

13. The 2019 Economic Survey reports various demographic and “economic aspects of intellectual property law practice, including individual billing rates and typical charges for representative IP law services.” Ex. 2 at 1. The survey participants are self-selected in response to an email invitation. *Id.* The 2019 Economic Survey reports that AIPLA received 961 responses and that many respondents did not answer all questions. *Id.*

14. The 2019 Economic Survey includes Delaware information only in the aggregate with other states, none of which have the same patent litigation practices. *See* Ex. 2 at 7. Delaware falls within the study location “Other East”, which includes practitioners from Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, and West Virginia, in addition to Delaware. *Id.* Because the patent litigation practice in many of these states bears little semblance to practice in this district, as a practitioner I look to comparable data from Philadelphia, the nearest specifically-listed market.

15. The 2019 Economic Survey lists “Private Firm, Equity Partner” rates for Philadelphia on page I-29, as follows:

Location	Number of Individuals	Mean (Average)	10th Percentile 10%	First Quartile 25%	Median (Midpoint)	Third Quartile 75%	90th Percentile 90%
Philadelphia CMSA	10	\$599	\$433	\$486	\$560	\$729	\$823

16. The 2019 Economic Survey, however, combines billing rates for patent prosecution and patent litigation professionals. *See* Ex. 2 at I-22. It treats these disparate areas of work in the field of patent law as the same for purposes of data aggregation. As reported for partners on page I-26:

Percent of time devoted to the following types of work, by Income Level (Q17)*Private Firm, Equity Partner*

		IP prosecution work	Opinions or counseling prior to litigation or formal ADR	IP licensing	Non-licensing transactional work	IP litigation	Post-grant proceedings	Other dispute resolution
Gross Income in 2018	TOTAL Number of Individuals	Mean (Average)	Mean (Average)	Mean (Average)	Mean (Average)	Mean (Average)	Mean (Average)	Mean (Average)
All Individuals	350	42.3%	8.7%	3.8%	2.2%	15.2%	3.4%	.7%
Less than \$126,000	9	56.0%	6.2%	.4%	.6%	3.9%	.2%	.3%
\$126,000-\$150,999	5	54.0%	13.6%	7.0%	2.0%	4.0%	.0%	.0%
\$151,000-\$175,999	5	60.0%	3.0%	2.2%	.2%	7.0%	.0%	.0%
\$176,000-\$200,999	19	46.3%	8.7%	5.6%	2.9%	8.4%	.5%	1.3%
\$201,000-\$250,999	31	44.8%	7.2%	3.8%	1.3%	15.8%	1.8%	.9%
\$251,000-\$300,999	37	52.3%	9.2%	5.0%	2.8%	8.4%	2.3%	.3%
\$301,000-\$350,999	28	48.0%	8.7%	4.7%	1.5%	13.0%	2.0%	.4%
\$351,000-\$400,999	31	46.1%	5.9%	4.3%	1.8%	13.6%	2.9%	.9%
\$401,000-\$450,999	31	51.6%	12.2%	3.5%	2.2%	8.7%	2.4%	.3%
\$451,000-\$500,999	24	37.9%	5.7%	4.0%	2.4%	21.8%	4.1%	.7%
\$501,000-\$600,999	23	34.2%	9.6%	2.5%	.9%	26.3%	8.0%	.7%
\$601,000-\$750,999	24	43.8%	13.2%	5.1%	5.0%	9.2%	1.0%	.0%
\$751,000 or more	62	29.7%	7.9%	2.5%	2.1%	23.4%	6.5%	.7%

17. This table indicates that the survey respondents skew heavily toward patent prosecution (identified in the table as “IP prosecution work”), which in my experience typically carries a lower billable rate than patent litigation work and can also involve a different fee structure. Further, while the 2019 Economic Survey reports billable rates by region, the survey does not break out other factors that impact actual billing rates like partner experience levels, litigation versus IP prosecution work, types of matters handled, litigation experience. Thus, while the survey results provide useful benchmarks for assessing the reasonableness of hourly rates in a complex patent litigation, the survey alone does not answer the question.

18. Karen Keller’s hourly rate (\$675-\$750) falls within the 75th-90th percentile of respondents to the 2019 Economic Survey, and my billing rate (\$560-\$729) falls within the 50th-75th percentile of respondents to the 2019 Economic Survey. *See* Ex. 2 at I-29. This is consistent with the fact that this engagement involves litigation, rather than prosecution. It is also consistent with the fact that we each have multiple years of experience in patent litigation in

the District of Delaware and elsewhere, as set forth in our attached biographies. *See* Exhibits 3-4.

19. Specifically, Karen Keller is a founding partner of Shaw Keller LLP with more than 15 years of experience in patent litigation in the District of Delaware. *See* Ex. 3. She has received multiple awards, has been recognized by a number of organizations, and has published multiple works relating to patent litigation. *See id.* I have more than 10 years of experience in patent litigation in the District of Delaware, including a clerkship with the Honorable Christopher J. Burke. *See* Ex. 4.

B. The Rates of Competing Firms Show That Shaw Keller's Rates Are Reasonable

20. The reasonableness of Shaw Keller's rates is further supported by the rates of competing firms within the District of Delaware, as evidenced by filings in the United States Bankruptcy Court for the District of Delaware. *See* Exs. 5-9.

21. I understand that, under the Bankruptcy Code, the reasonableness of paid in bankruptcy proceedings is measured in part by whether the rates are comparable to the hourly rates charged by comparably skilled practitioners in analogous non-bankruptcy fields such as intellectual property and complex corporate and commercial litigation matters, among other practice areas.

22. Thus, for example, the bankruptcy fee petition filed by Morris, Nichols, Arsht & Tunnell LLP states that the blended non-bankruptcy rates for its attorneys represented a ratio of

the total dollar amount billed by all timekeepers divided by the total hours billed by those timekeepers. *See* Ex. 8 at Ex. C n.2.

23. In a similar bankruptcy fee application, Young Conaway Stargatt & Taylor LLP stated that it views the services performed by its bankruptcy and intellectual property litigation attorneys as being comparable:

Young Conaway's blended hourly rates for attorneys and paraprofessionals in the Corporate Counseling and Litigation, Business Planning and Tax, and Intellectual Property Litigation sections of the Firm for the prior calendar year were as set forth below. Young Conaway believes that the services performed by those three sections of the Firm are comparable to the services performed in the Bankruptcy and Corporate Restructuring section.

Ex. 7 at Ex. D.

24. The following table shows rates for non-bankruptcy work based on filings in the United States Bankruptcy Court for the District of Delaware by (1) Morris, Nichols, Arsht & Tunnell LLP; (2) Richards, Layton & Finger, PA; and (3) Young Conaway Stargatt & Taylor LLP:

Table A

<u>Law Firm</u>	<u>Blended Non-Bankruptcy Partner Rate</u>	<u>Blended Non-Bankruptcy Paralegal Rate</u>
Morris, Nichols, Arsht & Tunnell LLP (May 1, 2018 to May 1, 2019) ¹	\$804.86	\$279.61
Richards, Layton & Finger, PA (calendar year 2018) ²	\$757.76	\$239.81

¹ Ex. 8 at ¶ 26. The rates for bankruptcy partners in this fee application ranged between \$1,100 and \$700 per hour. *Id.* at 3, 6.

² Ex. 5 at Ex. E (showing "Firm-wide" rates). The identified 2019 rates for bankruptcy partners (identified as "Directors") in this fee application ranged from \$975 to \$700 per hour. *Id.* at Ex. B.

<u>Law Firm</u>	<u>Blended Non-Bankruptcy Partner Rate</u>	<u>Blended Non-Bankruptcy Paralegal Rate</u>
Morris, Nichols, Arsht & Tunnell LLP (October 1, 2017 to October 31, 2018) ³	\$779.69	\$272.22
Young Conaway Stargatt & Taylor LLP (calendar year 2017) ⁴	\$807.00	\$212.00
Richards, Layton & Finger, PA (calendar year 2016) ⁵	\$699.22	\$222.16

25. According to the filings, the average hourly rates shown in Table A are “blended” rates for all timekeepers with the stated position, regardless of years of experience.

26. The data in Table A shows that the attorney rates for the firms increase over time. This is consistent with my experience.

27. Each of the firms listed in Table A is comparable to Shaw Keller in their intellectual property practices. Shaw Keller regularly litigates patent cases where the firms in Table A represent opposing or related parties (such as co-defendants in related cases). *See* Ex. 10 (listing exemplary current or recent Shaw Keller representations where the opposing party or a co-defendant in a related action were represented by one of the firms from Table A).

28. Likewise, Shaw Keller and each of the firms in Table A are ranked by Chambers and Partners, an independent research company, as intellectual property firms practicing in Delaware. *See* Ex. 11 at 1-2 (showing printouts from Chambers.com). Shaw Keller is ranked as a “Band 2” firm, the second-highest ranking. *Id.* at 4. Richards, Layton & Finger, PA has the

³ Ex. 9 at ¶ 16. The blended non-bankruptcy rates were determined from a ratio of the total dollar amount billed divided by the total hours billed, for “all Morris Nichols timekeepers [of the relevant type] who billed to matters excluding chapter 11 representations[.]” *Id.* at ¶ 14.

⁴ Ex. 7 at Ex. D.

⁵ *Id.*

same ranking. *Id.* Morris, Nichols, Arsht & Tunnell LLP is ranked as a “Band 1” firm, while Young Conaway Stargatt & Taylor LLP is ranked as a “Band 4” firm. *Id.*

29. Karen Keller’s and my individual hourly rates fall below the non-bankruptcy blended rates for the comparable firms in 2017-2019. Specifically, Karen Keller’s rates of \$750/hr (2020) and \$675/hr (2019), and my rate of \$650/hr, fall below the blended partner rates for all of the firms in the periods of 2017-2020. *See* Table A. My 2020 rate also falls below the blended rate for Richards, Layton & Finger, PA in 2016, while Karen Keller’s 2020 rate is in line with it.

30. My rate, as a partner, was also lower than the rate of at least one Morris, Nichols, Arsht & Tunnell LLP associate, Matthew B. Harvey, who billed at \$675/hr as of 2018. *See* Ex. 9 at 3.

31. The rates charged by Shaw Keller paralegals, \$175-\$225 depending on experience and time period, similarly fall below the contemporary blended paralegal rates of the comparable firms, and they are in line with the blended paralegal rates charged by Richards Layton Finger four years ago. *See* Table A.

III. The Number of Hours Spent on This Litigation Was Reasonable

32. I have participated in multiple patent infringement actions in the District of Delaware, including other cases that involved § 101 motions at the motion to dismiss stage, like this one. In my opinion, both the total amounts of fees incurred and time spent on each task were reasonable for a case of this nature and complexity.

33. The relevant monthly invoices are attached as Exhibit 1. Before sending any invoice, it is Shaw Keller policy to review the invoice to ensure that the time charged accurately reflected the work performed, was not excessive or redundant, and was reasonable given the

tasks undertaken. Karen Keller reviewed each of the attached invoices to eliminate any such time entries before they were sent.

34. Portions of some time entries in Exhibit 1 have been redacted to remove privileged and/or confidential information regarding the attorneys' fee motion. The information that was redacted is not necessary to evaluate the reasonableness of the time entries.

35. Some time entries in Exhibit 1 have been fully redacted. CompanyCam is not seeking fees for these entries.

36. The last invoice in Exhibit 1 is a draft that has not yet been sent to CompanyCam, but has been reviewed and accurately reflects amounts of time that will be billed through October 26, 2020. *See* Ex. 1 at 18-19.

37. Shaw Keller attorneys and paralegals only performed tasks that we believed were reasonably necessary to succeed in this litigation.

38. Shaw Keller also represented Epay Systems, Inc., a co-defendant in related action 19-1602-MN, and only billed CompanyCam for its proportion of the time spent on tasks that applied to both actions, such as preparing for and attending the scheduling conference in this action.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 27, 2020 in Chadds Ford, Pennsylvania.

/s/ Andrew E. Russell

Karen E. Keller (No. 4489)

Andrew E. Russell (No. 5382)

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